

U.S. Department of Labor

Office of Administrative Law Judges
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OALJ CASE NOS.: 1997-LHC-01848
1999-LHC-02897

BRB CASE NOS.: 99-0355 & 99-0355A

OWCP CASE NO.: 02-119134

In the Matter of

JOSEPH T. FLANAGAN
Claimant

v.

McALLISTER BROTHERS, INC.
Employer

and

ACE USA (formerly CIGNA)
Carrier

Appearances:

Donald E. Wallace, Esq. (MacDonald & Wallace), Quincy, Massachusetts,
for the Claimant

Keith L. Flicker, Esq. (Flicker, Garelick & Associates), New York, New York,
for the Employer and Carrier

Andrew J. Fay, Esq. (Fay, Flynn & Fay), Boston, Massachusetts,
for Fay, Flynn & Fay, Jacques Admiralty Law Firm, Allen Kellman, Esq.
and Frank Schwarz, Esq., Non-party Movants to Quash Subpoenas

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER ON REMAND AWARDING BENEFITS AND DENYING MODIFICATION

I. Statement of the Case

This proceeding arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901, *et seq.* (the "Act") and is currently before me pursuant to an order on reconsideration issued by the Benefits Review Board (the "Board") on April 6, 2000, remanding the case for consideration of unresolved issues and entry of an award consistent with the Board's prior decision in *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999). Also before me is a request filed by the Employer, McAllister Brothers, Inc., pursuant to section 22 of the Act to modify a prior award, specifically with respect to the applicability of the forfeiture provisions of section 33(g) of the Act, and a second claim filed by the Claimant to establish entitlement to reimbursement for specific medical expenses pursuant to section 7 of the Act. A hearing on remand and these additional matters was conducted in Boston, Massachusetts on July 11, 2000 at which time all parties were afforded an opportunity to introduce evidence and argument. Upon consideration of the entire record, including the Board's instructions and the arguments advanced by the parties, I have concluded that the Employer has not demonstrated grounds for modification pursuant to section 22 of the Act. I have further concluded that the Claimant is entitled to an award of permanent total disability compensation benefits, medical benefits, interest and attorney's fees, and that the Employer is liable for payment of a penalty pursuant to section 14(e) of the Act.

II. Procedural History

The Claimant, Joseph Flanagan who worked for the Employer between 1964 and December 1973, filed a claim for permanent total disability benefits under the Act after he became sick in February 1996 and subsequently received a doctor's interpretation of a chest x-ray indicating the presence of pleural asbestosis. The Employer declined to voluntarily pay benefits, and the matter proceeded to a hearing before Administrative Law Judge Lawrence P. Donnelly. Judge Donnelly issued a decision and order awarding benefits on September 18, 1998. Judge Donnelly found the evidence sufficient to establish invocation of the presumption under section 20(a) of the Act, that the Claimant suffers from a respiratory condition (asbestosis) due at least in part to work-related asbestos exposure and that the uncontested evidence of record established that the Claimant is permanently totally disabled from any form of gainful employment. Judge Donnelly further found that the Employer, McAllister Brothers, Inc., was the last covered employer to expose the Claimant to injurious stimuli and thus is the responsible employer. In addition, Judge Donnelly found that inasmuch as the Claimant had filed suit against third parties for his respiratory condition and settled these claims without the Employer's prior written approval for amounts that were considerably less than the amounts he would be entitled to under the Act, the Claimant had forfeited his right to disability compensation benefits pursuant to

section 33(g) of the Act.¹ However, Judge Donnelly held that the Claimant had not forfeited entitlement to medical benefits pursuant to section 33(g), and he thus awarded the Claimant reasonable and necessary medical expenses associated with his work-related respiratory condition to be paid by the Employer pursuant to section 7(a) of the Act. Upon the Employer's motion for reconsideration, Judge Donnelly again found that the Claimant's entitlement to medical benefits was not forfeited pursuant to section 33(g). Finally, Judge Donnelly awarded the Claimant's counsel a reduced attorney's fee of \$10,500, plus \$1,219.25 in expenses, based on the Claimant's limited success.

The Employer appealed to the Board, challenging the findings that the Claimant had not forfeited his entitlement to medical benefits, that his pulmonary disability is due at least in part to asbestos exposure and that the Employer is the responsible employer. The Employer additionally contended on appeal that Claimant's counsel is not entitled to an attorney's fee and costs if Judge Donnelly's award of medical benefits were to be reversed. On cross-appeal, the Claimant, whose position was supported by the Director, Office of Worker's Compensation Programs,² contended that the Employer had not met its burden of establishing the factual predicates for section 33(g) forfeiture and that Judge Donnelly consequently erred in finding his compensation benefits forfeited. In addition, the Claimant contended that the Employer is liable for a penalty pursuant to section 14(e) of the Act if

¹ Section 33(g) of the Act, in relevant part, provides,

(g) Compromise obtained by person entitled to compensation

(1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation as determined under subsection (f) of this section only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.

(2) If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.

33 U.S.C. § 933(g).

² The Board ordered the Director to file a brief addressing the section 33(g) issues.

the Board agreed that he should have been awarded permanent total disability benefits. The Board addressed the section 33(g) issue first, noting that it had previously concluded in *Barnes v. Liberty Mutual Ins. Co.*, 30 BRBS 193, 196 (1996) that an employer bears the burden of proving that a claimant entered into fully executed settlements without its prior written approval as section 33(g)(2) is an affirmative defense. *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209, 211 (1999). Since it determined that Judge Donnelly had improperly placed the burden on the Claimant to establish compliance with section 33(g)(1) rather than on the Employer to establish the Claimant's non-compliance, the Board reversed his finding that the Claimant had forfeited entitlement to compensation benefits:

In the instant case, the administrative law judge found that there is no evidence of record and no allegation by claimant that he obtained written approval from employer prior to executing the third-party settlements. This finding places the burden of proof on claimant to establish compliance with Section 33(g) rather than on employer to establish claimant's non-compliance. *Id.* As the administrative law judge properly found, however, although there is evidence that claimant entered into settlement agreements with Babcock and UNR, as well as testimony that he received the funds from those settlements, there is no affirmative evidence that employer did not approve the settlements. The sole evidence of record on this issue is claimant's testimony; when asked whether employer's written approval was obtained, claimant testified that he had "no knowledge" of that issue. H. Tr. at 68. Employer submitted no other evidence to establish that it did not give written approval of the settlement agreements. Thus, there is a complete lack of evidence that claimant did not obtain employer's written approval of the third-party settlements. Employer's argument that it cannot be made to prove a "negative fact" is not persuasive in the instant case. As the Director notes, employer failed to utilize routine discovery tools on the approval issue, or to produce its own witnesses to testify that approval was not sought or given. As the applicability of Section 33(g) is an affirmative defense for which employer produced no evidence, we reverse the administrative law judge's finding that the claim for compensation benefits is barred pursuant to Section 33(g)

Id. at 210 (footnote and citations omitted). The Board next rejected the Employer's challenge to Judge Donnelly's finding that the Claimant suffers from work-related asbestosis as it found that he had permissibly weighed the medical evidence and that substantial evidence supported his finding. Thus, the Board affirmed the finding that the Claimant suffers from work-related asbestosis, and it held that the Claimant is entitled to permanent total disability benefits and to the medical benefits. *Id.* at 213. Finally, the Board affirmed Judge Donnelly's finding that the Employer is liable as the responsible employer for any benefits awarded to the Claimant. *Id.*

Following the Board's decision, the Employer appealed to the Court of Appeals for the Third Circuit, and the Claimant and Director filed motions for reconsideration with the Board. In addition,

while the appeals from Judge Donnelly's decision were pending before the Board, the Claimant raised an issue before the District Director regarding his entitlement to specific medical benefits and reimbursement for medical costs³ which the District Director referred to the Office of Administrative Law Judges on September 1, 1999. ALJX 1.⁴ This matter was assigned to Administrative Law Judge David W. Di Nardi in view of Judge Donnelly's retirement, and Judge Di Nardi issued a Notice of Hearing for the week of March 1, 2000. ALJX 2. Thereafter, the Employer initiated a request with the District Director pursuant to section 22 of the Act, seeking modification of the Board's holding that the Claimant's entitlement to permanent total disability benefits were not subject to section 33(g) forfeiture, and it requested referral of its modification request to the Office of Administrative Law Judges so that it could be consolidated with the other issues pending before Judge Di Nardi. ALJX 3. The District Director referred the Employer's section 22 modification request to the Office of Administrative Law Judges on February 7, 2000, ALJX 12, and by letter dated February 9, 2000, the Employer requested that Judge Di Nardi consolidate the modification request with the other issues to be addressed at the hearing. ALJX 13. The Claimant objected to the Employer's modification request as not properly before the Office of Administrative Law Judges, and he also moved to quash subpoenas which counsel to the Employer had served on attorneys, who had been involved in litigation related to the Claimant's third-party settlements, seeking documents in connection with its section 22 modification request. ALJX 10, 16.⁵ The Claimant argued that all these subpoenas should be quashed on relevancy grounds and that the subpoenas served on attorneys who had represented him for violating the attorney-client privilege. On February 15, 2000, Judge Di Nardi issued an Order on Motion for Modification and Order Postponing Hearing in which he observed that both parties had requested a hearing, although for differing reasons, and he concluded that a reconvened hearing was necessary to render justice to all parties. Judge Di Nardi also postponed the hearing scheduled for the

³ It also appears that the Claimant sought modification of Judge Donnelly's decision pursuant to section 22 of the Act, ALJX 1 at 2 (Claimant's Pre-hearing Statement), but it is unclear from the record what aspects of the decision the Claimant sought to modify.

⁴ The record developed subsequent to the Board's remand of the case to the Office of Administrative Law Judges will be referred to as "ALJX__" for documents offered by the Administrative Law Judge, "CX__" for documentary evidence offered by the Claimant and "EX__" for documentary evidence offered by the Employer. References to the transcript of the hearing conducted on remand will be designated as "TR __".

⁵ The subpoenas issued at the Employer's request were served on Attorney Patrick Morgan of the Rifkin Law Offices (the "Rifkin" subpoena), Attorney David Tykulsker (the "Tykulsker" subpoena) and the law firm of Fay, Flynn & Fay (the "Fay" subpoena). The Rifkin and Tykulsker subpoenas requested production of "any and all correspondence between you and Donald Wallace, Esq. relating to Joseph Flanagan's claim under the LHWCA and/or the New Jersey Workers' Compensation Act." ALJX 10, Motion to Quash at 4. The Fay subpoena requested production of documents in that firm's possession relating to litigation involving the Claimant. *Id.*

week of March 1, 2000 based on his determination that there was insufficient time for the Board to remand the matter to the Office of Administrative Law Judges and for the parties to prepare for the hearing. ALJX 19. The Employer then filed motions with Third Circuit to dismiss its appeal and with the Board to remand the case, which was pending before the Board on the motions for reconsideration filed by the Claimant and the Director, to Judge Di Nardi. ALJX 17, 18. On March 30, 2000, the Third Circuit dismissed the Employer's appeal, and on April 6, 2000, the Board issued an order on reconsideration which remanded the case to the administrative law judge. ALJX 21. Specifically, the Board's order, in relevant part, states,

In their motions for reconsideration, claimant and the Director contend that the Board's decision left issues unresolved, specifically the determination of claimant's average weekly wage and the award of a penalty pursuant to Section 14(e). The Director also contends that the Board's decision does not award the claimant permanent total disability benefits from a specific date at a specific compensation rate. Claimant and the Director urge the Board either to enter an order awarding benefits based on an average weekly wage of \$500.00, or to remand the case to the administrative law judge to resolve these issues and to enter an award. Employer responds, urging the Board to remand the case to the administrative law judge for consideration of the unresolved issues. We also note that employer has filed a motion for modification before the administrative law judge, and that claimant has requested a hearing on the extent of outstanding medical bills. Therefore, in view of the pending motion for modification and inasmuch as there are issues of fact which require resolution by the administrative law judge, we remand the case to the administrative law judge for consideration of the unresolved issues, and for entry of an award consistent with the Board's decision.

Id., Order on Reconsideration at 2-3. Following the Board's remand, the case was reassigned to me, ALJX 25, and I rescheduled the hearing to July 11, 2000. ALJX 26. On May 12, 2000, I conducted conference with counsel for both parties on the motion to quash and other procedural matters. At this conference, I stated that I was satisfied from my review of the record that the Employer's section 22 modification request was properly before me.⁶ Counsel for the Claimant disagreed and continued to maintain that all three subpoenas should be quashed on relevancy grounds and that the Rifkin and Tykulsker subpoenas should be quashed on the additional ground that the requested documents are protected by the attorney-client privilege. Counsel to the Employer conceded the Claimant's point that

⁶ However, I advised the parties during the conference, and in my subsequent order on the Claimant's motion to quash, that I had not made any finding on the merits of the Employer's modification request, the Claimant's objections thereto or the admissibility of any evidence which may be offered in support thereof, as these issues would be addressed at the hearing.

correspondence between his attorneys is privileged, but maintained that Attorneys Morgan and Tykulsker should be directed to prepare a privilege log and that Fay, Flynn and Fay should be directed to comply with the subpoena since no privilege attaches to any documents in that firm's possession. At the conclusion of this conference, I took the motion to quash under advisement, and on May 16, 2000, I issued an order in which I granted in part and denied in part the Claimant's motion to quash. More particularly, I granted the Claimant's motion with respect to the Rifkin and Tykulsker subpoenas as the Employer conceded that the subpoenaed correspondence between the Claimant's attorneys is subject to the attorney-client privilege, and as there had been no showing or contention that the privilege had been waived. I also declined to order compilation of a specific itemization or privilege log of withheld documents since I found that correspondence between the Claimant's attorneys is clearly protected by the attorney-client privilege, and since the Rifkin and Tykulsker subpoenas did not seek any non-privileged documents. However, I denied the motion to quash the Fay, Flynn & Fay subpoena based on my determination that the Employer's section 22 modification request was properly before me for consideration.⁷ ALJX 27.

On May 26, 2000, The Claimant filed a motion for ruling on factual issues, essentially seeking a determination of his average weekly wage prior to the hearing for the purpose of allowing him to immediately receive permanent disability compensation benefits under the Board's decision. ALJX 28. The Employer filed an opposition to the motion on June 6, 2000, ALJX 29, and on June 21, 2000, I issued an order deferring ruling on the Claimant's motion until the hearing as I found, in agreement with the Employer, that a determination of the Claimant's average weekly wage could not be made on the basis of the Claimant's testimony before Judge Donnelly regarding his earning in 1973. ALJX 33.

By letter dated June 19, 2000, Attorney Andrew J. Fay of Fay, Flynn & Fay requested reconsideration of the May 16, 2000 order which denied the Claimant's motion to quash the subpoena served on Fay, Flynn & Fay by the Employer. In this letter, Fay, Flynn & Fay raised several concerns regarding the force and effect of the subpoena and regarding the privileged nature of the documents the subpoena sought to obtain. ALJX 31. I rejected the arguments concerning the force and effect of the Employer's subpoena but found merit in Fay, Flynn & Fay's assertion that the broad language of the subpoena encompassed documents protected by the attorney-client and attorney work product privileges. Accordingly, I issued an order on June 23, 2000 which modified the May 16, 2000 order by (1) directing Counsel to the Employer to contact Attorney Fay to clarify the scope of the Employer's subpoena and to attempt to arrive at a mutually-acceptable arrangement for production of non-privileged documents and (2) in the event that no resolution was reached with respect to the documents to be produced, directing Fay, Flynn & Fay to file a privilege log describing each document responsive to the Employer's subpoena as to which the attorney-client and/or work-product privilege is asserted and to produce all documents not described on the privilege log which were responsive to the

⁷ No attorney-client privilege was asserted by the Claimant with respect to the Fay, Flynn & Fay subpoena.

Employer's subpoena by July 4, 2000. ALJX 34.

Attorney Fay responded to this order in a letter dated June 29, 2000 which set forth a number of additional arguments and requested a stay of the July 4, 2000 deadline for compliance until a ruling was made on these additional arguments. ALJX 37. By order issued on June 30, 2000, I took the matters raised in Attorney's Fay's letter under advisement and extended the deadline to July 11, 2000, the date of the scheduled hearing. I further directed in this order that unless the subpoena issue was resolved informally by the parties, thus obviating Fay, Flynn & Fay's appearance at the hearing, Fay, Flynn & Fay would be prepared at the time and place of the hearing to comply with the June 23, 2000 order in the event such compliance was ordered. ALJX 39.

On June 20, 2000, the Employer moved for an order compelling the Claimant to respond to the Employer's request for the production of the following documents:

1. Any and all documents and correspondence relating the claimant's legal malpractice action against the Jaques Admiralty Law Firm and/or the Maritime Asbestos Legal Clinic, including but not limited to any and all correspondence from the claimant or anyone acting on behalf of the claimant to the Jaques Law Firm and/or the Maritime Asbestosis Legal Clinic concerning the obtaining of or the failure to obtain the employer's approval of third party settlements;
2. Any and all documents and correspondence relating to the claimant's claim for benefits under the New Jersey Workers' Compensation Act, including but not limited to any and all correspondence from the claimant or anyone acting on behalf of the claimant concerning the obtaining of or the failure to obtain the employer's approval of third party settlements; and
3. Any and all documents and correspondence not otherwise requested above that concern the obtaining of or the failure to obtain the employer's approval of third party settlements.

ALJX 32. By letter dated June 27, 2000, counsel to the Claimant responded in opposition to the Employer's motion, asserting that "any documents which my client may have in his possession concerning his dealings with the Jaques Admiralty Law Firm, the Rifkin Law Offices or Attorney David Tykulsker deal with attorney-client matters which indeed are privileged." ALJX 36. The Claimant further objected to the Employer's request for production on grounds of vagueness. *Id.* ALJX 36. In an order issued on June 30, 2000, I sustained the Claimant's objection to the extent that the Employer's request seeks production of documents subject to the attorney-client privilege. I further sustained the Claimant's objection to paragraph (3) of the Employer's request, as quoted above, because I found that documents relating to the obtaining of or failure to obtain the Employer's approval of any third party settlements, other than those third party settlements involving the Claimant which are the subject of paragraphs (1) and (2), did not appear to be relevant or reasonably calculated to lead to the discovery of admissible evidence. Accordingly, I ordered the Claimant to file a privilege log

describing each document responsive to paragraphs (1) and (2) of the Employer's request for production as to which the attorney-client privilege is asserted and to produce all documents not described on the privilege log and which are responsive to paragraphs (1) and (2) of the Employer's request for production by July 6, 2000. ALJX 38.

By letter dated July 5, 2000, the Employer moved to continue the July 11, 2000 hearing in order to afford it time to adequately and fully review any documents which Fay, Flynn & Fay might be ordered to produce in response to the Employer's subpoena and to discover further relevant information that may be referenced in the documents. ALJX 40. The Claimant filed an answer in opposition, asserting that any further delay in adjudication of his claim would result in severe economic hardship, ALJX 41, and he additionally filed a motion to preclude the Employer's request for section 22 modification. ALJX 42. On July 10, 2000, I denied the Employer's motion for continuance, noting that in the event that any documents were ordered to be produced at the hearing, consideration would be given at that time as to whether recess or adjournment is warranted to afford the Employer adequate time to review the documents and/or engage in further discovery. ALJX 43.

The hearing convened as scheduled on July 11, 2000 in Boston. Appearances were made by the Claimant, the Employer and Attorney Fay on behalf of Fay, Flynn & Fay. Formal papers were admitted without objection as ALJX 1 - 43, and documentary evidence offered by the Claimant was admitted without objection as CX A1 - A5, B1 - B14, C1-C19, D1-D2 and E1. TR 7-13, 86-87. The parties also entered into stipulations of fact which eliminated the need for an evidentiary hearing on the unresolved issues identified by the Board in its order on reconsideration remanding the case to the Office of Administrative Law Judges. Oral argument was heard on the Employer's section 22 modification request and on the issue of the subpoena served on Fay, Flynn & Fay. In support of its position on modification and section 33(g) forfeiture, the Employer offered documentary evidence which was marked as EX A - E. TR 56-57. The Claimant objected to the admission of this evidence, and I informed the parties that I would take both the modification issue and the Claimant's objections to the Employer's documentary evidence under advisement pending review of the record and consideration of the parties' written arguments. TR 57-62. With respect to the subpoena issue, I noted that the Employer had offered an October 22, 1999 affidavit, EX D, in which the Claimant states that written consent was not obtained from either the Employer or its insurance carrier before the Claimant entered into the third-party settlements, and I concluded that any additional evidence which the Employer sought to obtain from Fay, Flynn & Fay to prove that prior written consent was not obtained would be cumulative.⁸ TR 28-35. Consequently, I declined to order Fay, Flynn & Fay to comply with the Employer's subpoena. TR 52-54. At the close of the hearing, the parties were

⁸ Counsel to the Employer stated that the Employer had obtained this affidavit as well as other documentary evidence shortly before the hearing from the court docket of a malpractice action the Claimant brought against the attorneys who represented him in the third-party litigation based on their failure to obtain the Employer's prior written consent to settlements. TR 20-28.

allowed until July 25, 2000 to submit their written closing arguments. TR 92. At the Employer's request, to which the Complainant consented, a short extension to July 27, 2000 was granted. Both parties timely submitted written closing argument, and the record was then closed.

III. Discussion, Findings of Fact and Conclusions of Law

A. The Employer's Modification Request

In its brief in support of its request to reopen the claim pursuant to section 22, the Employer states that the issue of whether the Claimant settled suits against third parties in violation of section 33(g) first arose at the Claimant's December 16, 1997 pre-hearing deposition during which the Claimant testified that he had settled two lawsuits which had been instituted on his behalf by the Jaques Law Firm. Employer's Brief at 2. Specifically, the following testimony was elicited at the December 16, 1997 deposition:

Q. Do you recall if you ever signed any legal documents for that case.

A. Yes.

Q. Do you recall what you did sign for that case?

A. I signed an agreement with the attorney, and I signed a release.

Q. Do you know what the nature of that release is?

A. It was releasing Babcock and Wilcox, a boiler firm.

Q. Do you know why you released Babcock and Wilcox boiler firm?

A. They made a small settlement.

Q. How much money did you get?

A. I think it was \$1200, thereabouts. There was one other small one. I don't even remember the name of what it was. It was about \$400 in the same category.

Q. Without getting into the substance of any discussions you had, did anybody from that law firm ever interview you concerning your employment history?

A. No.

Q. Do you know if your lawsuit is part of a class action?

A. Somewhere along the line I was told that it was not.

RX 4 at 125-128.⁹ The Employer further states that it then served a subpoena *duces tecum* on the Jaques Law Firm and a request for production of documents on the Claimant's attorney in this proceeding to obtain documents relating to settlement of lawsuits against third parties. The Employer states that both efforts were opposed by claims of attorney-client privilege which the Employer characterizes as baseless.¹⁰ *Id.* at 2-3. Thus, the Employer asserts that its efforts to investigate the applicability of section 33(g) were frustrated as of the time of the hearing before Judge Donnelly. *Id.* at 3.

The record reflects that the Employer moved before Judge Donnelly to compel discovery and that this matter was resolved by agreement of the Claimant's counsel to produce the releases confirming the fact of the Claimant's settlements with the third parties. February 4, 1998 Hearing Transcript at 162-164. The Employer notes that these releases were produced and admitted into evidence by Judge Donnelly. Employer's Brief at 3. The Employer also elicited the following testimony from the Claimant at the hearing before Judge Donnelly:

Q. Do you have any knowledge as to whether any representative of McAllister Brothers was contacted before these resolutions occurred?

A. I have no knowledge of that.

February 4, 1998 Hearing Transcript at 67-68. The Employer further asserts that prior to the Board's decision, the Claimant filed a complaint in Massachusetts state court alleging that the Jaques Law Firm had been negligent in failing to secure the Employer's written approval as required under section 33(g). Employer's Brief at 4. According to the Employer, this not only conclusively established that the Claimant had not obtained the Employer's written approval prior to entering into the settlements of his third-party claims, but it "called into question the claimant's testimony at the initial hearing." *Id.* at 5. In this regard, the Employer argues, "[i]f in fact, as the Benefits Review Board found, the claimant's 'no knowledge' testimony did not mean that the employer's approval was not secured, then his later

⁹ The transcript of the Claimant's deposition testimony was received in evidence at the hearing before Judge Donnelly as RX 4. Additional questions posed by counsel to the Employer concerning the Claimant's communications with his attorney's concerning the third-party lawsuits were objected to as protected by the attorney-client privilege. RX 4 at 127-128.

¹⁰ For example, the Employer submits that there could not have been any *bona fide* argument that the releases executed by the Claimant in settling the third-party suits were protected from disclosure by the attorney-client privilege. Employer's Brief at 3 n.1.

assertion that no Section 33(g) approval was obtained was inconsistent with his testimony and warranted further investigation.” *Id.* (internal quotations in original). The Employer submits that it was its discovery of the Claimant’s suit against the Jaques Law Firm that prompted it to move for modification of the Claimant’s benefit status pursuant to section 22, and it points out that the Claimant’s October 22, 1999 affidavit, which was filed in the action against the Jaques Law Firm, plainly shows that the Claimant knew in March 1997 that the Employer had not been contacted to approve the two third-party settlements at issue. *Id.* at 6-7.¹¹

The Employer asserts that modification is appropriate in the circumstances of this case to correct a mistake of fact in the finding by the Benefits Review Board that there was no proof that the claimant failed to comply with the provisions of Section 33(g).” Employer’s Brief at 8. The Employer asserts that its modification request is not an attempt to relitigate an issue which should have been raised in the first proceeding. Rather, it states that the section 33(g) issue was raised and evidence was presented at the first hearing and that “to the extent that the employer failed to establish that the Claimant failed to obtain written approval of the settlements, this was a result of the claimant’s deliberate evasiveness and misleading testimony on this issue.” *Id.* at 8-9. In view of the Claimant’s refusal to produce any documents pertaining to the settlements of his claims against the third parties until the Employer’s motion to compel was argued at the hearing before Judge Donnelly, and the Claimant’s allegedly misleading testimony at the prior hearing, the Employer argues that reopening of the claim to correct the Board’s mistake of fact would render justice under the Act. *Id.* at 9, citing *Williams v. Jones*, 11 F.3d 247, 257 (1st Cir. 1993) (perjured testimony resulting in an erroneous finding of fact

¹¹ The Employer quotes the following from the Claimant’s October 22, 1999 affidavit in its brief:

Mr. [Donald] Wallace agreed to take my [LHWCA] case only af ter'an examination by Dr. Lawrence Baker. The Jacques Law Firm was notified of this by certified mail on March 3, 1997 after receiving the results of Dr. Baker's examination. In the same letter I requested an update on my case. While this was occurring another minor settlement crossed in the mail which I signed and returned on March 4, 1997, based on Atty. Kellman's statement that "Any Longshore claim would be offset by third party settlements." This release was not a total one as it allowed the case to be reopened if my condition essentially worsened [sic]. At this point I mentioned to Mr. Wallace that I had received the settlement and he asked me to keep him informed if any more settlements were forthcoming as he would have to file a "LS-33" form. **I believe it was at this point he contacted Mr. Kellman verbally to find out if they had filed the same for the prior settlements. Mr. Kellman stated to Wallace and me that they were not necessary.**

Employer’s Brief at 6 (boldface in original); EX E.

concerning the nature and extent of an employee's disability would seem to come squarely within the realm of a "mistake of fact") and *Jarka Corporation v. Hughes*, 299 F.2d 534, 537 (2nd Cir. 1962) (noting that a finding of a mistake fact may be based on "inaccuracy of the evidence" or "impropriety of the inferences drawn from" the evidence).

The Claimant argues that the Employer should be precluded from raising its section 33(g) defense by way of a section 22 modification proceeding. Noting that the initial hearing scheduled for November 1997 was continued at the Employer's request to February 1998 and that the Employer twice deposed the Claimant prior to the February 4, 1998 hearing, the Claimant initially states that the Employer had ample opportunity to develop, raise and present evidence with respect to the section 33(g) issue. The Claimant further notes that, despite this opportunity, the Employer called no witnesses and offered no documentary evidence on the section 33(g) issue at the first hearing, a tactical decision which resulted in the Board's determination to reverse Judge Donnelly's section 33(g) finding because the Employer clearly and repeatedly failed to meet its burden of establishing its affirmative defense under section 33(g). Claimant's Brief at 8-9. The Claimant acknowledges that modification is warranted to correct a mistake of fact but adds that the Board and the courts have held that modification should not be used as a backdoor route for retrying cases or to protect litigants from their own attorney's litigation mistakes. Since the Employer was aware of the potential section 33(g) issue prior to the hearing before Judge Donnelly and had ample opportunity to develop and introduce evidence in support of its position, and since the section 33(g) issue was fully litigated in the prior proceeding, the Claimant contends that the Employer's modification request is a blatant attempt to retry the section 33(g) issue and correct deficiencies in its litigation strategies. *Id.* at 11-14. The Claimant additionally contends that the Employer's modification request is premature since no order awarding benefits has yet been made pursuant to the Board's order on reconsideration and that even if the employer's modification request is found to have merit, the Claimant is nonetheless entitled to an award of benefits from the February 22, 1996 date of injury to the present. *Id.* at 9-11, citing *Spitalieri v. Universal Maritime Services*, 33 BRBS 6, 8 (1999) (section 22 allows a credit against unpaid compensation where a claimant's compensation rate has been decreased; otherwise, termination of compensation can not be effective prior to the date of the decision on modification).

Section 22 of the Act permits any party-in-interest to request modification of a compensation award within one year of the last payment of compensation or rejection of a claim on grounds that there has been a change in conditions or a mistake in a determination of fact. 33 U.S.C. §922. As discussed above, the Employer contends that the Board made a mistake of fact in determining that the Employer had not met its burden of establishing its section 33(g) affirmative defense, and it seeks to utilize the modification procedures under section 22 to correct this alleged mistake of fact by offering new evidence showing that the Claimant failed to obtain its written consent before entering into the settlement of his third-party claims. Section 22 provides broad discretion to correct mistakes of fact, whether they are demonstrated by wholly new evidence, cumulative evidence, or merely by further reflection on the evidence initially submitted. *O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 255-56 (1971). The fact-finder's authority to reopen proceedings extends to all mistaken factual

determinations, including mistaken determinations of mixed questions of law and fact. *Ring v. I.T.O. Corporation of Virginia*, 31 BRBS 212, 214-215 (1998). However, while section 22 has been broadly interpreted as a vehicle for ensuring that the interests of justice are served, it does not provide parties with an unlimited opportunity to reopen a prior award or denial whenever they find themselves dissatisfied with the outcome of prior litigation. Rather, the need to render justice must be balanced against the need for finality in decision-making. *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 25 (1st Cir. 1982). As the Court of Appeals for the District of Columbia Circuit cautioned in *McCord v. Cephas*, 532 F. 2d 1377, 1380-81, “an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt . . . [t]he congressional purpose in passing the law would be thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and who, if right, could have thereby saved all parties a considerable amount of expense and protracted litigation.” *See also* 3 Larson Workmen’s Compensation Law §81.52 (“It is clear that an allegation of mistake should not be allowed to become a back door route to re-trying a case because one party thinks he can make a better showing on the second attempt”). Thus, the Board has held that reopening a case based on an allegation of a mistake of fact is discretionary and that an administrative law judge should consider whether reopening will render justice under the Act, a consideration which requires a balancing of competing equities – the need to render justice against the need for finality in decision-making. *Kinlaw v. Stevens Shipping and Terminal Company*, 33 BRBS 68, 73 (1999).

In *Kinlaw*, a case relied on by the Claimant, the employer petitioned to modify a prior award of permanent partial disability benefits by offering a new letter from the Claimant’s treating physician which clarified his prior inconsistent opinions regarding the Claimant’s physical restrictions and the requirements of his job. The administrative law judge denied the employer’s modification petition based on her finding that the employer failed to timely develop this evidence and reopening the claim would not serve the interests of justice. The Board affirmed the denial of modification, holding that the administrative law judge rationally concluded that the employer should have anticipated the need to clarify the treating physician’s opinion prior to the first hearing and noting that the employer’s only explanation for not developing the new evidence earlier was an erroneous belief that it was not necessary. *Id.* at 74. *See also* *Jenson v. Weeks Marine, Inc.*, 33 BRBS 97, 100 (1999) and *Lombardi v. Universal Maritime*, 32 BRBS 83, 86-87 (1998) where the Board affirmed ALJ denials of modification where employers attempted to introduce vocational evidence which it had not offered at the first hearing and where the employers set forth no indication as to why, in preparation for the first hearing, it did not develop vocational evidence in support of an alternative defense that claimant could perform suitable alternative employment. *Compare* *Delay v. Jones Washington Stevedoring*, 31 BRBS 197, 204-205 (1998) (where the Board vacated the administrative law judge’s exclusion of a post-hearing labor market survey offered by the employer in support of a modification request based on a determination that extenuating circumstances, the claimant’s failure to produce a physical capacity evaluation during pre-hearing discovery, excused the employer’s failure to develop the labor new market survey which addressed the previously withheld physical capacity evaluation, prior to the first

hearing).

With this instructive precedent concerning the proper application of section 22 in mind, I will turn now to the Employer's modification request. As an initial matter, I will overrule the Claimant's objection to the evidence offered by the Employer at the July 11, 2000 hearing as it is necessary to consider this evidence in evaluating the propriety of reopening the claim. *See Kinlaw* at 71. Accordingly, Employer's exhibits EX A - E have been admitted. However, after considering this evidence and the Employer's arguments in light of the facts and history of this case, I have concluded that allowing reopening and modification would not render justice but rather would frustrate the orderly administration of justice and the need for finality in decision-making. In reaching this conclusion, I am not persuaded that the Employer was precluded from developing and introducing evidence at the first hearing in support of its section 33(g) affirmative defense, including evidence showing that the Claimant did not obtain its written approval before executing the third-party settlements, by the Claimant's allegedly baseless assertion of attorney-client privilege objections during pre-hearing discovery or by giving misleading or evasive testimony at the hearing. To the contrary, the record shows that the Claimant testified directly and without equivocation or evasion during his pre-hearing deposition in December 1997 that he had entered into settlements with two third parties. This disclosure certainly was sufficient to put the Employer on notice of the possible availability of a forfeiture defense under section 33(g) and to afford it an opportunity to develop its own evidence prior to the February 4, 1998 hearing. As the Board pointed out, the Employer simply could have called its own witnesses to testify that approval was not sought or given, but it chose not to do so. I give no credence to the Employer's claim that it didn't develop or offer any evidence because of any misleading or evasive testimony elicited from the Claimant. The Claimant testified in response to a question posed by counsel to the Employer that he had no knowledge of whether any representative of the Employer was contacted before the third-party settlements occurred. TR 67-68. The fact, as revealed by the Claimant's October 22, 1999 affidavit (EX E), that he apparently knew in 1997 that written consent had not been obtained from the Employer, does not necessarily render his testimony at the first hearing misleading or evasive. That is, he might have known that written consents were not obtained but not had any knowledge as to whether any Employer representative had ever been contacted. At worst, his testimony in response to this question was ambiguous as to whether he knew whether the Employer's written consent had been obtained in advance of his execution of the third-party settlements. Significantly, the Employer did not pursue this line of questioning further to clarify the Claimant's testimony. From my review of the record, it is abundantly clear that this failure was not due to any confusion on the Employer's part. Rather, it was a consequence of the Employer's position that its burden under section 33(g) is satisfied by demonstrating that the Claimant entered into a third-party settlement and that it does not have to carry the "additional burden of showing that the necessary written approval was not obtained." Employer's Brief in Opposition to Claimant's Petition for Review at 3. The Employer thus litigated this case under the theory that once it produced evidence that the Claimant entered into settlements with third parties, it had completed its defense under section 33(g) and that the burden then shifted to the Claimant to show that he had obtained the Employer's prior written consent. The Board rejected the Employer's argument, concluding that the applicability of

section 33(g) is an affirmative defense for which the Employer failed to produce any evidence that the Claimant did not obtain its written consent before entering into the third-party settlements. In my view, allowing the Employer's modification request to go forward in order to afford the Employer a second chance to carry its section 33(g) burden by now offering evidence which it could have introduced at the first hearing would amount to a retrying of the case which section 22 does not sanction. Accordingly, the Employer's request for modification pursuant to section 22 of the Act is denied.

B. Permanent and Total Disability Benefits.

The Board affirmed Judge Donnelly's finding that the Claimant is permanently and totally disabled by his work-related respiratory disease, and the parties have stipulated on remand that the Claimant's average weekly wage is \$505.65. TR 71. Pursuant to the Board's instructions, I will enter an appropriate award of permanent total disability compensation benefits.

C. Medical Benefits

An Employer found liable for the payment of compensation is, pursuant to section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 22 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). A claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. *Tough v. General Dynamics Corporation*, 22 BRBS 356 (1989); *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978).

The Board affirmed Judge Donnelly's finding that the Claimant is entitled to section 7 medical benefits. The Claimant subsequently filed a second claim to establish entitlement to reimbursement by the Employer for specific medical expenses that he has incurred. Records documenting these expenses were admitted at the hearing as CX C-19, and the parties stipulated at the hearing that the medical care for which these expenses are claimed is causally related, with one exception,¹² to the Claimant's work-related disabling respiratory disease. TR 86. Based on the parties's stipulation and pursuant to the Board's instructions, I will enter an award ordering the Employer to pay the Claimant medical benefits and reasonable travel expenses pursuant to section 7 of the Act. The order will include the expenses listed in EX C-19, with the exception of the \$75.00 bill from Dr. Fitzgerald, to the extent such expenses are determined by the District Director to be reasonable.

¹² The parties agreed that one expense listed in EX C-19, a \$75.00 bill from Dr. Thomas Fitzgerald which appears on page one of the listing, is not causally related to the Claimant's respiratory disease. TR 83, 86.

D. Interest

Although not specifically authorized in the Act, the Benefits Review Board and the Federal Courts have consistently upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. *Strachan Shipping Co. v. Wedemeyer*, 452 F.2d 1225, 1228-30 (5th Cir.1971); *Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *rehearing denied* 921 F. 2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556 (1978), *aff'd in pertinent part and rev'd on other grounds sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979); *Santos v. General Dynamics Corp.*, 22 BRBS 226 (1989). The Board has also concluded that inflationary trends in the economy have rendered a fixed interest percentage rate no longer appropriate to further the purpose of making claimant whole, and it has held that “the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982)” which is the rate periodically changed to reflect the yield on United States Treasury Bills. *Grant v. Portland Stevedoring Company*, 16 BRBS 267, 270 (1984), *modified on reconsideration*, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. My order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

E. Penalty under Section 14(e)

The Board instructed resolution on remand of whether the Employer should be assessed a penalty pursuant to section 14(e) of the Act. Section 14(e) provides:

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

33 U.S.C. §§ 914(e). The section 14(e) penalty applies only to “any installment of compensation not paid within 14 days.” 33 U.S.C. §902(12). It does not apply to accrued unpaid medical benefits. *Scott v. Tug Mate, Inc.*, 22 BRBS 164, 169 (1989). In order to escape section 14(e) liability, the employer must pay compensation, controvert liability, or show irreparable injury. *Frisco v. Perini Corp., Marine Div.*, 14 BRBS 798, 800 (1981). At the hearing before Judge Donnelly, the parties entered into the following stipulations:

* * * * *

3. That the Employer was advised of the alleged injury on October 5, 1996 (date of LS 203 form).

4. No notice of controversion has yet been filed.

* * * * *

6. No benefits have been paid to date for either total or partial disability nor have any medical benefits been paid.

ALJ Decision and Order at 2. Based on the parties' stipulations, I find that the Employer has neither paid compensation nor filed a timely notice of controversion. Since the Employer has offered no evidence or argument that assessment of the penalty would result in irreparable injury, I will order payment of appropriate penalty on the Claimant's unpaid compensation benefits.

F. Attorney's Fees

Having successfully established his right to compensation and medical benefits, the Claimant is entitled to an award of attorneys' fees under section 28(a) of the Act. *Ingalls Shipbuilding v Director, OWCP*, 920 F.2d 163, 166 (5th Cir. 1993). Accordingly, I will allow a period of 30 days for the Claimant's attorney to submit the required application for fees for services performed on behalf of the Claimant with respect to his claim for benefits under the Act. 33 U.S.C. §928(c); 20 C.F.R. §702.132.

IV. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. McAllister Brothers, Inc. shall pay to the Claimant permanent total disability compensation benefits from February 22, 1996, and continuing, plus the applicable annual adjustments provided in

Section 10 of the Act,¹³ based upon an average weekly wage of \$505.65, such compensation to be computed in accordance with section 8(a) of the Act.

2. McAllister Brothers, Inc. shall furnish the Claimant with such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related occupational disease has required from February 22, 1996 (including the expenses for medical care listed in Claimant's Exhibit CX C-19 with the exception of Dr. Fitzgerald's \$75.00 bill on page 1 of said exhibit), and continuing, pursuant to the provisions of section 7 of the Act.

3. McAllister Brothers, Inc. shall pay to the Claimant interest on all past due compensation benefits at the Treasury Bill rate applicable under 28 U.S.C. §1961 (1982), computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

4. McAllister Brothers, Inc. shall pay to the Claimant a penalty of ten per centum on all unpaid compensation benefits pursuant to section 14(e) of the Act.

5. The Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to counsel for the Employer/Carrier and the Director who shall then have fourteen (14) days to comment thereon.

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

DANIEL F. SUTTON
Administrative Law Judge

Camden, New Jersey

¹³ Annual adjustments pursuant to section 10(f) of the Act are payable on October 1st of each year once a claimant acquires status of permanent total disability. *Phillips v. Marine Concrete Structures, Inc.*, 895 F.2d 1033, 1035 (5th Cir. 1990). The Claimant acquired such status on February 22, 1996.